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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 381 OF 2007
ALONGWITH
CRIMINAL APPEAL NO. 214 OF 2007

Govind Maruti Bhoite ... Applicant

V/s

The State of Maharashtra & ors. ... Respondents

Mr. Milind Deshmukh for the applicant.

Mr. A.S. Shitole, A.P.P. for the respondent State.

CORAM: D. G. DESHPANDE &
SMT. NISHITA MHATRE, JJ.

DATED: 26TH APRIL, 2007.

P.C.:

1. The application for bail was on record. However, the learned advocate for the accused contended that he would like to argue whether it is the case under Section 302 or 304 Part II of the Indian Penal Code.

2. According to him, this is not a case of murder. Therefore he drew our attention to the deposition of mother of the child, PW-3 Asha Govind Bhoite, wherein she has stated that,

> "When my daughter got up from the sleep, my husband got angry. She started crying. My husband was angry because his sleep was broken. My husband snatched my daughter from me and he started beating her. My husband gave slap to her and also fist blow on her back. He also held my daughter ups and down by holding her legs. He also dashed her against Diwan. Therefore, my daughter became unconscious."

The advocate for the accused stated that even if this is accepted, it will not be a case of murder under Section 302 but it will be the case of culpable homicide not amounting to murder, where there was no intention though knowledge could be inferred that if such a force is used against a child of one year, then it is bound to result in death.

3. We find considerable force in this argument. The learned A.P.P. tried to contend that an intention has to be gathered from the circumstances and the circumstances brought by the evidence of the mother do indicate that the accused was very much upset with the cries of the child.

4. In the circumstances we hold that there was no

intention of the accused to kill his own child. Therefore, from the evidence of the mother, it is clearly a case under Section 304 Part II of the Indian Penal Code. Regarding the sentence, the advocate for the accused tried to contend that the accused is in jail for the last two years and the sentence he has already undergone is sufficient to tilt in justice. We are not in agreement with that submission. The minimum sentence in the circumstances has to be five years. Therefore, we pass the following order :-

O R D E R

(i) The application for bail rejected.

(ii) The appeal is partly allowed.

(iii) The conviction of the accused under Section 302 of the Indian Penal Code is set aside. He is convicted under Section 304 Part II of the Indian Penal Code and sentenced to suffer five years rigorous imprisonment.

(D.G. DESHPANDE, J.)

(SMT. NISHITA MHATRE, J.)